"TRUSTS."

I.

PRACTISING lawyers in so progressive a country as America are continually met with new devices, with new legal situations, with want of remedies, for which neither the text-books nor their legal education afford them precedent or direct advice; and their law schools, to which they would naturally look for relief, forgetting perhaps too easily that law — at least, American law — is a science that is always becoming, never being, overlook the present in their study of the past. Like an exuberant vine, first twining for support upon the rocks of practice and precedent, it then separates, overthrows, and, lastly, scatters them into new heaps whose equilibrium is more stably adjusted to the needs of a growing democracy. It seems that the pages of this REVIEW are a happy ground where those who are battling in fields of practice may meet others still clear-minded with the quiet wisdom of theory; nor should the law-student hear without interest those questions which newly vex the active bar, though it may be years ere they are cut short by statute, or come to authoritative decision, and thence broaden down to text-books, and become an orthodox part of the science of the law.

We have heard much of the dangers of corporations in late years; but, while our publicists had hardly whetted their swords to meet this question, we are confronted with a new monster a thousand times more terrible. Every student knows how corporations have grown from a monastic institution to the predominance they now occupy in the business world; but American ingenuity has invented a legal machine which may swallow a hundred corporations or a hundred thousand individuals; and then, with all the corporate irresponsibility, their united power be stored, like a dynamo, in portable compass, and wielded by one or two men. Not even amenable to the restraints of corporation law, these "trusts" may realize the Satanic ambition, — infinite and irresponsible power free of check or conscience. Corporations are bad enough; it is one of the defects of the historical growth of law that the conditions which attend the birth of a legal idea so infinitely differ from those that make possible its greatest

development; but the trust is to the corporation what the mitrailleuse is to a blunderbuss.

The "trust," as the word is here employed, meaning by it a combination of property, real or personal, with powers of management or absolute disposal, or of stock in corporations, in the hands of a few persons, is a perfectly new device in the law. There are as yet positively no reported cases in courts of last resort regulating or interpreting them; nor have any statutes been enacted bearing upon the subject. The matter is therefore, an entirely open one, to be determined by lawyers on general principles of law, and by business men entering into such trusts upon ordinary principles of business sagacity. The objects of the "trust" may be broadly stated to be, either (1) monopoly, (2) concentration of power in few hands, (3) evasion of the laws regulating corporations,—any or all of them. Of course, under monopoly we include the pooling of prices and wages, the regulation of production, the extermination of competitors.

We must further distinguish two kinds of these trusts; the first, or more simple kind, where tangible property, real or personal, or stock (meaning stock-in-trade or cattle), or manufacturing property or businesses are given directly to or placed in the hands of a few men for management, control, or disposal; second, where the stock or franchises of corporations are placed in the hands of a few men or of a dominant corporation for the same purposes. The latter class, which is even more complex and of more questionable legality than the first, we shall for convenience term corporate trusts.

The origin of the word "trust" seems to have been the well-known Standard Oil Monopoly. The defenders of the trust point to this as a justification both of the need of the invention and its practical success. In the Standard Oil case there were a few men who had acquired controlling interest in a few (at first) manufacturing or mining properties, situated in different States. How could they manage them all? Not personally, for they wished to avoid personal liability; not through corporations, for, as their acquisitions increased, it was seen that the whole time of these two or three men would be taken up by going about to corporate meetings, publishing notices, placating stockholders, and complying with the (to them) vexatious restrictions concerning corporate management of the several States wherein their business lay.

Accordingly the famous Standard Oil Trust was drawn; written, I believe, in ordinary handwriting, of which there is but one copy in existence, and that kept from the possession of the parties to the trust themselves. No other person has ever seen it, and all the public can know about it is to judge it by its fruits; for since that trust was drawn, the Standard Oil has grown to be a more powerful — corporation, shall we call it? or what? for this is one of our questions — than any other below the national government itself.

We may take the Standard Oil as the type and consummation of the simple business trust. Ectypes are springing up in all directions with portentous rapidity. Philadelphia, in particular, is the home of trusts, for a Philadelphia lawyer is said to have invented them. Trusts for monopolizing the gas production of the country; the water supply system; the horse-railway system; the cotton-seed oil business, of which more later; the cattle trust; the rubber trust; the straw-board trust,—the list is endless. Now, these trusts have one legitimate advantage, the economy that arises from the united management of a large concern, owning the best inventions, buying its supplies in the lowest market, and employing the best advice and most skilled labor. Moreover, by this general system many offices and management charges in each local enterprise are dispensed with. But here, almost immediately, those advantages which may be called absolutely legitimate end; it is questionable whether under older ideas even the "regulation" — *i.e.*, repression — of production is so. One of the great advantages of some trusts is the power they possess of *destroying* private enterprise. Take the Philadelphia gas, for instance (and the name is purposely misquoted), a company which owns gas-works in a hundred cities. Say that in two of these are competing works, and that the gas costs the company sixty cents a thousand; a price at which the competing company can also live. The Philadelphia company puts its price in those two cities down to ten cents a thousand, and charges its patrons sixty-*one* cents in the other ninety-eight cities. The profits of the Philadelphia company remain the same, but its only two remaining rivals are ruined.

Now, before turning to the law, let us take an example of the other and even more dangerous trusts,— corporate trusts. They are usually created for controlling the stock or management of the corporation in whose shares they consist; thus creating a sort of a

machine upon a machine, one fictitious person within another. And the process may even be repeated indefinitely, one-half the trusted stock being sold, *i.e.*, the certificates for it, and a new trust created of the other half, plus one share to ensure a majority; so that, as long as the public continue to accept these trust certificates for stock, we may, by a sort of system of Chinese boxes, one within the other, see finally the absolute control of a corporation vested in a sixteenth or a thirty-second interest in its actual capital. And the peculiar profit to the insiders in these is, that they require little expenditure of money to give enormous power. For the so-called trust-certificates, which carry no voting power, may be sold in the exchanges as readily as the stock they represent; and the trustees having sold half the company's actual stock, and trust-certificates representing the other half, have got back all their money, and are left with half the stock of the original corporation to ensure their own control, besides being parties-trustees to an irrevocable trust-deed.

II.

The consideration of this subject falls naturally into two branches: first, the relation of such trusts to public policy, and herewith of their legality and probable future treatment by courts and legislatures; second, the effect of them upon persons or parties entering into them, and herewith of their general advisability and safety to the persons concerned.

The objection that such trusts tend to create a monopoly applies equally to both classes, — the simple and the corporate trust. But this, until the legislatures have made enactments to that effect, and except, perhaps, in those States which have constitutional provisions forbidding monopolies, must be deemed a merely sentimental objection. The following States and one territory, as I have noted in my book on American Statute Law, section 404, have such a constitutional provision: Maryland, North Carolina, Tennessee, Arkansas, Texas, New Mexico. It might also be urged against both classes of trusts that they may be void as creating a perpetuity. On careful consideration, however, it does not appear that this is the case. For, in the first place, no such perpetuity could be created where, as is usually the case, the trustees or managers of the trust have full power to convey all or any part of the property put in the trust; and, in the second place, the better

opinion is that no perpetuity is created except as to a future limitation. The mere tying up of property, for however long or indefinite a period, is no perpetuity in itself, whatever may be the result as to subsequent limitations. (See Gray on Perpetuities.) It is, however, to be carefully considered, that a deed of property to certain persons in trust for a period beyond twenty-one years, or for an indefinite period, with limitation thereafter to the original owners, may possibly be attended with the danger of putting the absolute property in these managers, so that the subsequent limitation would be void, and the original owners or other persons could never recover it back.

There is a third general objection, applying to both classes of these trusts, and one which must be considered fatal in those States where it applies. This is, that the laws of several States specify expressly all objects for which legal trusts may be created, and forbid, expressly or by implication, all others. These States are New York, Michigan, Wisconsin, Minnesota, California, Dakota, North Carolina, Georgia, Pennsylvania, Connecticut, Kentucky, and Vermont. (American Statute Law, sect. 1703.) These allowable objects of trusts may be roughly stated to be for the selling of lands; for the receiving of the rents and profits of lands, and applying them to the use of any person for his life or any shorter time; for the accumulation of rents and profits for the time by law allowed; for the benefit of any person where the trust is fully expressed and clearly defined, *subject to the limitation of the law against perpetuities* (in Michigan and Wisconsin), and for public or charitable purposes. As none of the objects of the trusts treated of in this article would fall under these exceptions, any trust which carries property in any of these States would seem to be in that State void. But I have met lawyers who held a contrary opinion.

There is a fourth legal objection, which applies to the second variety only, which we have termed corporate trusts. This is, that they practically do away with the whole law regulating corporations, with all the safeguards regulating their corporate management, the control of their stock, and the exercise of their franchises, besides evading all the laws regulating their capitalization and consolidations.

It may seriously be questioned whether a *quo warranto* will not lie on relation to the attorney-general of the State to test by what

right the managers of such trusts exercise corporate franchises (see the Cotton-seed Oil case below), and it may also be questioned whether the courts will not set aside all such trusts as contrary to public policy.

But, notwithstanding all this, it may be reasonably urged that, until the courts have set aside such trusts or any one of them, and until the legislatures have forbidden or regulated them by statute, there is no objection to entering into them, provided their nature and terms are such as to make it profitable to enter into them, and reasonably safe according to ordinary law and business principles. And this brings us to the second branch of the subject, namely, their effect upon the interests of the individuals composing them, and their legal rights, as against the trustees or managers, and in the common property so entrusted.

First, as to simple trusts. Of such nature are the business and manufacturing trusts, like the Straw-board Trust and the Cotton-seed Oil Trust, and the Cattle Trust, *when no corporations are constituent members of the trust;* if corporations are involved, the only difference is that the effects and criticism applying to the second class, as mentioned below, are superadded.

One fundamental objection to all such trusts is their secrecy. It is very common for such trusts to be created without allowing the individuals who entrust their property or its management even to see the deed or declaration which sets forth the duties and liabilities of the managers and the rights and liabilities of the persons composing it. Sometimes, perhaps, even no such declaration is drawn up and signed.

In considering what such a deed should contain we must again make a distinction between two possible kinds of trust,—the trust of management or control merely, and that of property and management. In the first kind the individual member parts with the management or control of his property, wholly or partially, while retaining the property title to his individual possessions; in the second, he parts with his title also, and gets in return a mere certificate of his proportionate or appraised interest in the general trust.

The first kind is comparatively free from danger. If the individual is satisfied with the trustees, and sees nothing to object to in the proposed system of management, and if the prospect of increased profits is sufficiently great to make him willing to part

with his inalienable right of doing what he will with his own, such a trust may justify itself to his judgment. It may probably be said that such a trust is generally most beneficial to those who have made a failure in their individual business; and, therefore, those who have a concern already profitable should scrutinize it with great care. And in connection with this point there should certainly be, in all these trusts, a provision to enable the individual to withdraw his property from the trust upon giving reasonable notice, if he does not like the way things are going; nor should any such trust be created, save for a definite term of years,—ten years at the most. No argument, however specious, should lead the individual to dispense with this provision in the deed of trust, in the first kind, or management trust, at least; for, if at the end of the term of years the trust has proved a success, a majority can be relied on to continue it; if not, it is best for all but the weakest that it should be dissolved. In the property trust, however, it is more difficult to make this provision; for in this case the individuals have finally parted with their individual property; in many trusts, particularly those of stock-in-trade, or other personal property, their individual shares cannot be traced, or, if traced, they have been modified, increased, improved, or altered; the individual has only a certificate entitling him to a certain aliquot part of the general trust property.

Next, let us consider the legal effect of the trust as among the members, and between the members and the trustees. Will the courts rule that such trusts create a partnership, as between the individual members and the trustees, or even as between the members and each other who are not trustees? The trustees, in effect, enter into the liabilities of partners as among themselves. Particularly would this be the case when the trust-deed is not duly recorded; and it is to be remembered that the individual members have formally appointed the trustees their agents; they have put their property and business into a common pool, made it liable for each other's debts, in the general business,—a business which, moreover, they are probably still superintending, at least in detail, themselves; and, moreover, the managers, or so-called trustees, have probably put similar property and businesses of their own in, and are acting thus in the double capacity of member and manager. If not partners, what are they? They have put capital into a business which is certainly not a corporation, nor yet a joint-

stock association, however closely the "trust-certificates" may resemble, in appearance, certificates of stock; and they have filed no declaration of limited partnership under the statute, and, moreover, they are "transacting business for the concern, or acting as agent therefor."

But it will be replied, they are not partners, but *cestuis que trustent*. Assuming, therefore, that the courts will so hold, let us consider the transaction from this point of view. The stockholders have parted with their property, and have nothing to show for it but the trust-certificate — a mere receipt, but upon which, if sealed or expressed to be for valuable consideration, it is doubtful if the law will imply any trust at all. The trust must, therefore, be declared by the trust-deed, assented to by the trustees or managers.

Now, generally, it will be impossible to define, with any degree of accuracy, what the objects of the trust are to be; and it is always impossible to define the duties of the trustees and the methods to be employed by them in managing their business. Practically, unless the trust contemplates a definite sale of all the property at a limited price, the words of the trust-deed, however elaborate, will amount to this: To manage the aggregate property for the equal good of all concerned. It will be possible, perhaps, to provide that the profits, if any, are to be divided among the certificate-holders when made; but who is to determine when they are made, or what are the profits?

Now, what are the rights of the certificate-holders? Holders of corporate stock have the following principal rights and privileges: they may sell their stock; they may govern the management of property by frequent elections; the property cannot be sold, mortgaged, leased, or consolidated, or its business changed, without their express consent; breaches of duty by the officers may be easily enjoined by any stockholder; and they are not individually liable for the debts of the corporation or its officers.

How many of these ordinary rights of corporate management do the certificate-holders retain? Of their possible liability for the debts of the trusts and its managers I have already spoken. They can only sell or assign their certificates in States which have a special statute authorizing assignment of choses in action; in other States the buyer will perhaps have to file a bill of equity to get complete title. They have no power to remove trustees who prove

dishonest or dangerous, nor to replace them by good ones. The managers may sell, incumber, add worthless properties, consolidate with others, lease, leave idle, or apply the lands to the growing of cucumbers, the machinery to the extraction of sunshine from them, and the live-stock to the menagerie trade, if they so choose; unless, of course, the trust-deed restricts them, which is not usually the case; and if they cannot sell and convey under the trust, then neither can the stockholders, and, as there is no provision for deeding back, the property is tied up indefinitely. Finally, if the members think the managers are acting unskilfully they have no remedy whatever; and even if the trustees act wrongfully, they have only a long and uncertain bill in equity to ascertain the objects of the trust, and remove the trustees if it can be proved that they have acted fraudulently; and I am inclined to think this bill would have to be unanimous to be successful, at least unanimous so far as the certificate-holders who were not trustees were concerned.

As to the other class of trusts, which we have termed corporate, the objections are more numerous and serious. If the trust sought to merge the corporations themselves, or their franchises, it would be illegal beyond all question. If the trust provides for the assignment of all the corporate assets only, it is undoubtedly illegal, as *ultra vires*. And, even if the corporation merely relinquishes its power of management through and by its own stockholders, it is possibly *ultra vires* still.

But the usual way in which the corporate trust is affected is by assignment of stock, by all or a majority of the stockholders, to the managers of the trust. As all the forms of law could be complied with, and the trust managers continue to vote themselves in as directors and keep up the corporate management, it is probable that there is no legal obstacle to this; though it is possible that a bill would lie, even by a single dissenting stockholder, to enjoin such managers from merging the corporation business in any such trust combination.

Until new legislation, therefore, such trusts may be considered legal, though they practically do away with all the law of corporations.

The minority stockholders are usually driven into such a combination by threats that "outside" or un-trusted stock will not share in the benefits anticipated. So far as the earnings or proceeds of

the assets of the company are concerned this is an idle threat. The majority of stockholders cannot sell the assets of the company and keep the consideration, but must allow the minority to have their share. (Menier *v.* Hooper's T. W., 9 L. J. Ch. App. Ca. 350, 354.) And the language of Judge Wallace is noteworthy in Ervin *v.* O. R. & N. Co., 27 Fed. Rep. 630: "It cannot be denied that minority shareholders are bound hand and foot to the majority in all matters of legitimate business . . . but the corporate powers can only be exercised to accomplish the objects for which they were called into existence, and the majority cannot control these powers to pervert or destroy the original purpose of the corporations. When a number of shareholders combine to constitute themselves a majority, in order to control the corporation as they see fit, they become for all practical purposes the corporation itself, and assume the trust relation occupied by the corporation toward its shareholders." And it has lately been held by Judge Wheeler, in Woodruff *v.* The D. & S. C. R.R. Co., that where stock is deposited in such a trust with power to vote and sell, but the stock certificates, though deposited, are not actually assigned to the trustees, that such a deposit, with the attendant power to vote, is revocable by a single stockholder at any time.

III.

But the only case in which the general status of these trusts has yet approached discussion is that of the State of Louisiana against the Cotton-oil Trust, now still pending. The bill charges that this organization, although a foreign association carrying on business in Louisiana, has no domicile or place of business in that State, or known agent upon whom process can be served, as the Constitution of the State requires; and, further, has no license or permit to carry on business, and pays no taxes to the State of Louisiana or the city of New Orleans. The bill reviews the history of the association from its beginning, alleging, *inter alia*, that it was never properly incorporated, like other incorporations, but sprang into life as an association under an agreement and by-laws which it has kept to this day a profound secret; that it was established for the purpose of controlling and monopolizing the cotton-seed market; and that, having secured possession of the leading mills in the State, it has proceeded to depreciate the value

of cotton-seed,— a valuable commercial product,— which it has forced down in price from $14.00 to $6.00 per ton, to the injury of the planters engaged in raising the seed.

It is further charged, that all the lines of transportation in the State of Louisiana, both by land and water, are, through the machinations of this powerful monopoly, discriminating in favor of shipments of cotton-seed consigned to manufacturers controlled by the trust, to the injury of the business of all manufacturers who are not in the ring. That "the said illegal association has within the last year acquired a majority of the stock in the several corporations organized and operating in this State, under the laws thereof, for the purpose of purchasing cotton-seed oil, soap, oil-cake, and other articles of commerce. That the American Cotton-oil Trust acquired the majority of stock in said corporations, organized under the laws of this State, by exchanging certificates of its stock for certificates of stock in said corporations at a premium and advance thereon, and have elected directors and are controlling and operating said cotton-mills, the property of said corporations, solely for the interest and benefit of said illegal association. In making said exchanges the Trust illegally fabricated, manufactured, and issued certificates purporting to represent shares in the equity to the property held by the trustees of the American Cotton-oil Trust. No such estate or trust-title is valid under the laws and jurisprudence of Louisiana.

"Petitioner avers that the trust is an illegal, invalid, and corrupt association; the object and aims thereof are in contravention of the constitution and laws of this State, and its existence should be suppressed and destroyed."

The prayer of the bill is for a permanent injunction against the association from doing business in the State, and that the American Cotton-oil Trust be adjudged guilty of usurpation, intruding into and unlawfully holding and exercising the privileges of a corporation without being duly incorporated, and be forever excluded and debarred from the franchises and privileges within this State, and declared to be an illegal, invalid, and fraudulent association.

It will be seen that this case is in effect an information, in the nature of *quo warranto*, brought by the attorney-general. A demurrer was filed to the bill in due course, and this demurrer has been overruled.

This case raises the radical question, that is, of the very legal existence of the "trust" itself. For this reason its future progress should be watched with the greatest interest.

It has been sought in this article merely to raise questions, — legal doubts, — which the author certainly is incompetent to solve. Space forbids more than the merest mention of them. It is probable that many conflicting decisions in the courts, and many years' time will come, before this new question becomes settled, even in its general lines; and it is possible, perhaps desirable, that the knot be cut by stringent legislation. In the present opinion of the author such would be the best way out of the difficulty; for of the ultimate injury to be caused by such huge, irresponsible, indeterminate concerns there can be little difference of opinion. He would, therefore, close with the suggestion of three statutes, whose rigid enforcement might, with due adjustment to meet evasions, be expected to meet the case.

I. Every organization, association, combination, or trust of persons or corporations, which seeks to control, combine, pool, or consolidate the business or property of any persons or corporations engaged in any trade, business, or manufacture, or which seeks to consolidate several such properties, or unite several businesses, or place the property of individuals or corporations, or the capital stock thereof, in the hands of individuals for control or management, shall be deemed a corporation, and subject to all the regulations of the laws as such.

II. No proxy, or power of attorney given to vote or assign corporate stock, shall be valid for a longer period than ninety days; and every certificate issued, purporting to represent corporate stock, or an equitable interest in a portion of such stock, shall carry with it the power to vote on said stock; and all other such certificates shall be void.

III. No corporation shall hold, or control, directly or indirectly, or through any trustees or agents, the stock of another corporation.

The last provision may, to our present lax ideas upon the subject, seem stringent and unpractical; but it seems to me the strict remedy must now be applied, if we would escape greater evils.

F. J. Stimson.